

EX PARTE OR LATE FILED

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116

TELEPHONE (202) 424-7500

FACSIMILE (202) 424-7647

WWW.SWIDLAW.COM

KATHLEEN L. GREENAN
ATTORNEY
DIRECT DIAL (202) 945-6922
KLG@SWIDLAW.COM

NEW YORK OFFICE
919 THIRD AVENUE
NEW YORK, NY 10022-9998
(212) 758-9500 FAX (212) 758-9526

February 5, 1999

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BY HAND DELIVERY (original and one copy)

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation in CC Docket Nos. 98- 184 and 98-141

Dear Ms. Salas:

Pursuant to Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a) (1997), this letter is to provide notice of an *ex parte* presentation in the above-referenced proceedings on February 4, 1999. The presentation was made by Michael Oyster of Network Plus, Inc. and Kathleen L. Greenan of Swidler Berlin Shereff Friedman, LLP ("SBSF"), to Robert C. Atkinson, Donald K. Stockdale, Jr., Jennifer Fabian, and To-Quyen Truong, of the Common Carrier Bureau and Patrick J. DeGraba, Pamela A. Megna, and Johnsie Garrett of the Office of Public Policy. The purpose of the meeting was to discuss the problems encountered by competitive local exchange carriers, such as Network Plus, in entering the local exchange market. Mr. Oyster described Network Plus' current operations and marketing strategy in addition to explaining the difficulties faced when working with and relying on incumbent local exchange carriers.

Copies of Network Plus, Inc.'s comments and reply comments filed in dockets 96-61 and 98-183 were provided to Robert C. Atkinson and are attached to this *ex parte* notice for submission into the record of the above-referenced dockets.

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Magalie Roman Salas
February 5, 1999
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Should any further information be required with respect to this *ex parte* notice, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script, reading "Kathleen Greenan". The signature is fluid and elegant, with the first name "Kathleen" and last name "Greenan" clearly distinguishable.

Kathleen L. Greenan

Enclosures

cc: All Participants
Mr. Michael Oyster

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Policy and Rules Concerning)	CC Docket No. 96-61
Interstate, Interexchange Marketplace)	
)	
Implementation of Section 254(g) of the)	
Communications Act of 1934, as amended)	
)	
1998 Biennial Regulatory Review –)	CC Docket No. 98-183
Review of Customer Premises Equipment)	
and Enhanced Services Unbundling Rules)	
in the Interexchange, Exchange Access,)	
and Local Exchange Markets)	

COMMENTS OF
NETWORK PLUS, INC.

Russell M. Blau
Kathleen L. Greenan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Dated: November 23, 1998

Counsel for Network Plus, Inc.

SUMMARY

In these comments, Network Plus will show that market conditions have **not** changed sufficiently to warrant lifting the bundling restrictions on ILECs. In addition to maintaining a monopoly over the basic telecommunications services market, ILECs can use control over critical enhanced services to preserve their large market share. By bundling basic telecommunications services with these enhanced services, the ILEC forces consumers to continue to subscribe to the ILEC's basic telecommunications service despite a consumer's wish to use a competitor's service. This abuse and violation of the bundling restrictions by ILECs demonstrates that lifting such restriction on ILECs is **not** in the public interest.

The impermissible bundling of services by incumbent ILECs is stifling competition and effectively preventing numerous consumers from obtaining services from competitive carriers. In addition to violating bundling restrictions, the practice of tying the availability of a monopoly controlled service to the purchase of a competitive service violates federal antitrust laws. The Federal Communications Commission ("FCC") must require ILECs to cease this anti-competitive behavior. While Network Plus believes that the bundling restriction should be lifted on non-dominant carriers, Network Plus urges the FCC to continue to impose this restriction on ILECs for the reasons discussed herein.

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**COMMENTS OF
NETWORK PLUS, INC.**

Network Plus, Inc. ("Network Plus"), by its counsel, respectfully submits the following comments in response to the Further Notice of Proposed Rulemaking issued in the above captioned proceedings.³

I. INTRODUCTION

Network Plus, founded in 1990, is a communications provider offering switched long distance, data and enhanced telecommunications services. The Company's customers consist primarily of small and medium-sized businesses located in major markets in the Northeast and

³ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Further Notice of Proposed Rulemaking, CC Docket No. 96-61, FCC 98-258, released October 9, 1998 ("*NPRM*").

Southeast regions. Network Plus also provides international wholesale transport and termination services to major domestic and international telecommunications carriers. As of July 15, 1998, the Company served over 34,000 customers representing in excess of 150,000 access lines and 30,000 toll-free numbers.

Network Plus currently offers local service on a commercial basis in certain New England states and intends to offer local services in its remaining target markets by first quarter 1999. The Company also plans to add Internet services to its offerings by the end of 1998. Network Plus has received authorization to provide competitive local exchange services in Connecticut, Florida, Massachusetts, New Hampshire, New York and Rhode Island and has pending applications for local exchange authority in Georgia, Maine, New Jersey, Pennsylvania, Tennessee, and Vermont. Network Plus intends to provide its local services via resale initially, eventually transitioning its customers to the Company's own facilities-based network. The Company also plans to expand its customer base to the work-at-home market and other residential customers.

As explained in detail below, the impermissible bundling of services by incumbent local exchange carriers ("ILECs") is stifling competition and effectively preventing numerous consumers from obtaining services from competitive carriers. The Federal Communications Commission ("FCC") must require ILECs to cease this anti-competitive behavior. While Network Plus believes that the bundling restriction should be lifted on non-dominant carriers, Network Plus urges the FCC to continue to impose this restriction on ILECs for the reasons discussed below.

II. BUNDLING RESTRICTIONS MUST CONTINUE TO BE IMPOSED ON ILECs

In this proceeding, the FCC will examine "whether market conditions have changed sufficiently to warrant lifting [] restrictions on the bundling of CPE and enhanced services with basic

telecommunications services.”⁴ In this vein, the FCC seeks comment on the extent to which the continued application of bundling restrictions is no longer in the public interest as a result of meaningful economic competition.⁵ In these comments, Network Plus will show that market conditions have **not** changed sufficiently to warrant lifting the bundling restrictions on ILECs. In addition to maintaining a monopoly over the basic telecommunications services market,⁶ ILECs can use control over critical enhanced services to preserve their large market share. By bundling basic telecommunications services with these enhanced services, the ILEC forces consumers to continue to subscribe to the ILEC’s basic telecommunications service despite a consumer’s wish to use a competitor’s service. This abuse and violation of the bundling restrictions by ILECs demonstrates that lifting such restriction on ILECs is **not** in the public interest.

A. Bundling Restrictions Prevent Anticompetitive Behavior

The FCC places restrictions on the bundling of enhanced services and telecommunications services.⁷ These restrictions on bundling prevent carriers from offering distinct goods and/or

⁴ *NPRM* at para. 3. Bundling is the sale of different goods and/or services together in a single package.

⁵ *Id.* at para. 4.

⁶ *E.g.* In its response to the Second CCB Survey on the State of Local Competition, Bell Atlantic reported the total local lines it has provided to other carriers and the total lines it has in service, as of June 30, 1998. The number of total local lines Bell Atlantic provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: Washington, D.C. - 0.75%; Delaware - 1.4%; Massachusetts - 2%; Maryland - 0.4%; Maine - 0.3%; New Hampshire - 1.1%; New Jersey - 0.4%; New York - 2%; Pennsylvania - 1.4%; Rhode Island - 0.8%; Virginia - 0.3%; Vermont - 0.2%; West Virginia - 0%. *Id.* Of the total lines Bell Atlantic provided other carriers, 12.3% were UNEs. *Id.*

⁷ *Id.* at para. 1.

services *only* on a bundled basis.⁸ The FCC prohibited bundling “out of a concern that carriers could use such bundling in an anticompetitive way.”⁹ The restriction on bundling prevents a carrier from requiring a customer that wants to purchase basic telecommunications services from being forced to also purchase an enhanced service.¹⁰ In its *NPRM*, the FCC correctly points out that “[n]ot only would those customers be forced to buy a product they may not want, but other companies trying to sell” the competitive product could be unfairly deprived of customers.¹¹

When the FCC adopted its bundling restrictions, there was not local exchange competition and the goal of the restrictions was to prevent monopolization of enhanced services. Now that the local exchange market is open to competition, bundling can be used to exert market power for telecommunications services as well. A carrier may require a customer that wants to purchase just the enhanced service to also purchase basic telecommunications services. Thus, the customer is forced to buy the telecommunications service from a carrier it does not want service from in order to obtain the enhanced service. Meanwhile, other carriers are precluded from offering those customer competitive telecommunications services. Competition can be, and will be, brought to a halt as the monopolistic carrier bundles its competitive telecommunications services to its monopoly controlled enhanced service.

⁸ *Id.* at para. 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *NPRM* at para. 2.

B. By Violating Bundling Restrictions, ILECs Are Engaging in Anticompetitive Behavior with Grave Results for Consumers

As mentioned, Network Plus is currently operating as a local exchange carrier in certain states and has successfully marketed its services to consumers who want better priced, quality local service customized to their specific needs. Unfortunately, due to impermissible bundling by ILECs, customers have been unable to subscribe to Network Plus services if they rely on voice messaging service (“VMS”) provided by the ILEC. When Network Plus’ customers switch over to Network Plus’ network, their VMS is terminated by the ILEC.¹² Many consumers consider VMS a critical service and have come to rely on VMS in assisting their business and/or personal needs. Thus, these consumers cannot switch competitive service providers.

Recognizing the importance of VMS to consumers and knowing that ILECs are not currently required in many states to resell VMS, Network Plus attempted to negotiate an arrangement with Bell Atlantic whereby a retail customer who chooses to convert their local exchange service to Network Plus could continue to subscribe to Bell Atlantic VMS. Bell Atlantic could continue to bill the subscriber directly for VMS, and for any other enhanced services that the customer chose to buy from Bell Atlantic.¹³ Bell Atlantic responded to Network Plus’ proposal by refusing to provide VMS to a consumer *unless that consumer purchases local service from Bell Atlantic* (see letter from Bell Atlantic to Network Plus attached as Exhibit A). Therefore, the consumer who wants to continue

¹² Some ILECs require the consumer to cancel VMS prior to switching local exchange carriers.

¹³ While Network Plus maintains that voice messaging service is a telecommunications service under the Telecommunications Act of 1996 (“Telecommunications Act”), these comments reflect the current treatment of VMS by ILECs and the FCC.

to receive VMS must continue to purchase the Bell Atlantic's local service, preventing the customer from reaping the benefits of services and prices offered by competitive carriers.

ILECs such as Bell Atlantic *only* offer VMS to consumers that subscribe to their local exchange service. This impermissible bundling of enhanced and basic telecommunications service is not only stifling the growth of competition, but depriving consumers of choice. ILECs cannot have it both ways. If they claim that VMS is an enhanced service and not subject to resale, then ILECs cannot bundle the service with telecommunications service to the detriment of the market and consumers.

III. THE FCC SHOULD REMEDY DISCRIMINATION AGAINST CONSUMERS WHO CHOSE COMPETITIVE CARRIER SERVICES BY ENFORCING ITS BUNDLING RESTRICTIONS AND REQUIRING ILECS TO SELL ENHANCED SERVICES INDIVIDUALLY

The reevaluation of the bundling rules provides the FCC with the opportunity to remedy one of the most serious anticompetitive bundling practices in operation today – discrimination by ILECs, such as Bell Atlantic and SNET,¹⁴ who refuse to make VMS available to customers that chose to subscribe to competitive telecommunications services of Network Plus and other competitive local exchange carriers ("CLECs"). The ILECs have been abusing their control of VMS and violating bundling restrictions in the process.

A substantial and growing number of business and residential telecommunications customers purchase VMS as part of their telephone service. As noted, many of these consumers consider VMS a critical service to their business. To date, the FCC has not required ILECs to offer

¹⁴ Southern New England Telephone Company ("SNET") has a so-called "neutral" team of agents that contact customers who have authorized a switch of local exchange carrier from SNET to a competitive carrier such as Network Plus. Apparently, these agents notify the customer that their voice mail service will be terminated upon switching to the new local exchange carrier.

VMS for resale to CLECs.¹⁵ ILECs offer VMS for resale in a few states,¹⁶ but in most jurisdictions ILECs are refusing not only to allow resell of VMS but are refusing to provide VMS as a separate enhanced product to customers of competitive carriers under any terms or at any price.¹⁷ As soon as consumers discover that the ILEC will cancel their VMS and that the CLEC is unable to provide VMS that includes Station Message Detail Indicator ("SMDI"),¹⁸ most VMS customers lose interest in Network Plus or switch immediately back to the ILEC, despite the fact that the customer prefers Network Plus' competitive rates and telecommunications service.

¹⁵ Although it has not filed any formal comments, Network Plus supports the pending petition filed by the Telecommunications Resellers Association for a declaratory ruling from this FCC that voice messaging services are telecommunications services and consequently must be made available for resale. *Petition of the Telecommunication Resellers Association for a Declaratory Ruling That Voice Messaging Services are Telecommunications Services That Must Be Made Available for Resale at Wholesale Rates Pursuant to Section 251(c)(4) of the Communications Act of 1934, as Amended* (March 5, 1998). The comments of Network Plus in this proceeding address an additional, or alternative, remedy in urging the FCC to require ILECs to offer VMS directly to CLEC customers.

¹⁶ See, e.g. Florida (*see Petition by MCI Telecommunications Corporation for arbitration with United Telephone Company of Florida*, Arbitration Order, Dkt. No. 961230-TP, Order No. PSC-97-0294-FOF-TP, 26 (March 14, 1997)); Minnesota (*see Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCI metro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with USWest Communications, Inc.*, Docket No. P-422 et al., at 27 (December 2, 1996)).

¹⁷ The California Commission recently modified its decision to require resale of VMS and ordered Pacific Bell and GTE California to "make voice mail services available to end users of a [CLEC] when the end-user's service is provided on a resold line of the [ILEC]." Pacific Bell and GTE tariffs should permit the end user or the CLEC acting as the agent of the end user to order the services, which must be the same in functionality and price as voice mail services provided to the ILECs retail customers. (*Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service* (Rulemaking 95-04-043), Decision 97-08-076 (August 15, 1997), *modified*, Decision 98-10-020 (October 8, 1998).

¹⁸ SMDI provides a message signal (*i.e.*, stutter dial tone or message light) that is essential to most customers.

For a still-emerging CLEC such as Network Plus, deployment of SMDI-capable VMS is prohibitively expensive due to the high fixed start-up costs. These start-up costs cannot be borne over Network Plus' relatively small subscriber pool. Network Plus is not aware of any third-party that is able to offer SMDI-capable VMS on resold lines. When ILECs originally invested in SMDI-capable VMS their monopoly guaranteed a customer base to spread the costs over. Unfortunately, an ILEC's anticompetitive refusal to provide VMS service to Network Plus customers, either directly to the customer or through resale, frustrates Network Plus' ability to expand its customer base to a size that in the future could hopefully support an independent VMS system.

A. The FCC Should Continue to Impose Its Bundling Restrictions on ILECs

The fundamental purpose of the bundling restriction is to protect consumers from being compelled to purchase inefficient or otherwise unattractive services that they would not choose to purchase in a fully competitive market. Any element of service important to consumers – basic service or enhanced – that is effectively controlled by a small number of providers is susceptible to anticompetitive bundling practices. The FCC rules prohibit an ILEC with market power in the provision of basic local service from requiring customers to purchase enhanced services as part of their basic service. The FCC must also recognize that some ILECs possess dominant, or even monopolistic, market power in the provision of certain enhanced services, such as SMDI-capable VMS. It is unclear whether the FCC bundling rules prohibit ILECs from requiring the customer to purchase basic service in order to obtain a desired enhanced service, even though such a practice produces the same anticompetitive effects. If the FCC's bundling restrictions do not already extend to such scenarios, then the FCC must strengthen its bundling restrictions against ILECs to prohibit

ILECs from bundling any service that it maintains market control over. Consumers should be able to obtain such services individually, apart from the competitive service.

When the FCC's bundling rules emerged from the *Computer II Final Decision*¹⁹ in 1980, consumers had few, if any, alternatives for the provision of basic local service. Therefore, the FCC had little cause to formulate rules to protect consumer choice in a competitive LEC market that did not exist. Eighteen years later, the bundling restriction must continue to be imposed on ILECs to prevent anticompetitive efforts of forcing a consumer to subscribe to ILEC basic telecommunications service in order to obtain VMS.

The protection of CLECs from anticompetitive bundling practices is arguably even more important now than the bundling concerns of the FCC in *Computer II* in view of the Telecommunication Act's goal of a fully competitive local exchange telecommunications market. While in 1980 the protection of alternative CPE and enhanced service providers held little prospect of fostering increased competition for basic local service, the protection of CLECs today during their ongoing emergence into local exchange market promises to benefit *both* the local services market and the enhanced services market. Therefore, the FCC should continue to impose its bundling restrictions on ILEC and prohibit ILECs from discriminating against customers of other CLECs in their offering of critical enhanced services.

B. The ILECs Have No Justification For Refusing Consumer Who Want to Purchase VMS Independent of any other ILEC Service

The result, if not the primary objective, of the ILEC's VMS bundling practice is to suppress competition in the local exchange market by refusing to provide an important independent service

¹⁹ *Computer II Final Decision*, 77 FCC2d 384.

to customers who would otherwise choose a different LEC carrier. Senator Ted Stevens recently observed that ILECs are manipulating the classification of VMS as an enhanced service to frustrate competition for telecommunications services.²⁰

ILECs have been unable to offer any compelling legitimate justifications for their refusal to sell VMS in a nondiscriminatory fashion. After being rebuffed in its attempts to obtain VMS for resale, Network Plus recently asked Bell Atlantic to permit Network Plus customers to subscribe to and/or to maintain Bell Atlantic VMS accounts after switching to a competitive carrier. Network Plus even offered to discuss arrangements under which it would bill VMS charges on behalf of Bell Atlantic. Bell Atlantic rejected all suggestions. Bell Atlantic's only justification for its discrimination against CLEC customers was that, because VMS is a "relatively low-priced enhanced service," "there is neither a legal requirement nor a good business case for BA to take on the administrative, operational, and cost burdens associated with offering voice mail service to end users who do not receive BA local exchange service." (*see* Bell Atlantic letter attached as Exhibit A). To the contrary, the provision of VMS to Network Plus customers is both technically and economically feasible for ILECs. But for the anticompetitive effects of VMS bundling, the provision of VMS to Network Plus customers would be profitable for Bell Atlantic,²¹ particularly when Network Plus is willing to discuss the assumption of administrative responsibilities and costs associated with the provision of VMS to its customers.

²⁰ *The Internet And The Telecommunications Act of 1996*, Senator Ted Stevens, Harvard Journal on Legislation, 35 Harv. J. on Legis. 5, 28 (Winter 1998).

²¹ In Massachusetts, Bell Atlantic charges business customers \$12 per month for VMS. (MA decision, p.4) This price is almost as much as the price for Bell Atlantic local service plan for residential customers.

IV. IN ADDITION TO THE FCC BUNDLING RESTRICTIONS, BELL ATLANTIC'S PRACTICE OF TYING BASIC TELECOMMUNICATIONS WITH VMS VIOLATES FEDERAL ANTITRUST LAW

Bell Atlantic's admitted practice of tying the availability of voice mail services to the purchase of basic local exchange service is a practice long condemned under the antitrust laws. The Supreme Court has found such tying arrangements unlawful *per se* because they inevitably decrease competition without any counterbalancing pro-competitive benefits.²²

Bell Atlantic's practice of conditioning the availability of voice mail upon the purchase of a second and distinct product, basic local exchange service, represents a quintessential unlawful tying arrangement because Bell Atlantic is using its recognized power over voice mail to induce customers to purchase basic local service, which customers would prefer to purchase as a separate service from a different competitive provider, a CLEC. The fact that Bell Atlantic and other ILECs have traditionally bundled these two products is not a defense. With the emergence of competition in the local exchange market, consumers now desire to take advantage of this competition by purchasing basic local service as a separate service.²³ At the same time, consumers do not wish to forego voice mail service. However, under Bell Atlantic's tying program, consumers have a "Hobson's Choice": they must forego voice mail if they wish to take advantage of competitive basic local service, or they must purchase both services from the incumbent. But this choice is no choice

²² *United States v. Microsoft Corp.*, 1998-2 Trade Cases ¶ 72,261 (D.D.C. 1998) (1998 WL 614485 at 7).

²³ *Klamath-Lake Pharm. Ass'n. v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1289 (9th Cir. 1983) ("Products that function together and are sold in combination may still be 'separate' if consumers would prefer to buy them individually at the price necessary to market them separately.").

at all. Any consumer who desires voice mail will purchase local service from the ILEC, as long as the two services are linked.

Because ILECs retain market dominance in the voice mail services market and because there is little competitive threat to this dominance in the near term, due to the expense of entering this market, ILECs have a strong economic incentive to leverage their control of the voice mail market to insulate themselves from competition in the more competitive market for local exchange service. Incumbents can readily achieve this leveraging by tying the availability of voice mail to the purchase of basic local service. If permitted to tie these two independent services together, incumbents will effectively preserve their dominance not only in the voice mail market, but also in the second newly competitive basic local services market. Such monopoly leveraging is anticompetitive and unlawful under federal antitrust laws.²⁴

In summary, there can be no doubt that incumbent local exchange carriers have a strong economic incentive to leverage their power in the voice mail market to preserve their dominant share of the local services market, and Bell Atlantic's admitted practice of linking the two services will accomplish this purpose unless the incentive is removed by the Commission.²⁵

²⁴ *E.g., Great Western Directories, Inc. v. Southwestern Bell Telephone Co.*, 63 F.3d 1378, 1386 (5th Cir. 1995) (local telephone companies are able to leverage their control of directory listing information ("DLI") into the competitive telephone directory market). In this case, Southwestern Bell raised its price for DLI to independent telephone directory competitors for the purpose of raising production costs to a level that would drive its low-margin competitors from the market. *Id.* at 386; *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

²⁵ *See, Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997).

V. NON-DOMINANT CARRIERS SHOULD BE PERMITTED TO BUNDLE CPE AND ENHANCED SERVICES WITH TELECOMMUNICATIONS SERVICE

Network Plus submits that the concerns that led to the adoption of bundling restrictions are not applicable to non-dominant providers of telecommunications services. By definition, non-dominant carriers lack the market power that would enable them to engage in the conduct that provided the basis for the bundling prohibition. These carriers cannot compel customers to purchase unwanted services because customers have a choice of service provider in the services provided by CLECs since ILECs do not have monopoly on any distinct good or service.. If a customer does not like the terms and conditions under which a service is offered, including any bundling of CPE or enhanced services, the customer may move to another service provider. Discriminatory conduct by non-dominant carriers intended to disadvantage competitors will be ineffectual since the competitor can choose another service provider. Accordingly, the underpinnings that supported adoption of the bundling prohibition are not applicable to non-dominant carriers and it should be eliminated for them.

Network Plus does not believe that there is any basis for distinguishing between non-dominant providers of interexchange and local exchange service for purposes of application of the bundling prohibition. Non-dominant carriers lack the ability to engage in the type of conduct that was of concern to the FCC regardless of whether they are providing interexchange service or local exchange service. Accordingly, the prohibition should be removed for non-dominant providers of both local exchange and interexchange service.

In addition, permitting bundling by non-dominant carriers could benefit consumers by enabling these carriers to create useful service packages that would increase the range of choices

available to consumers. Permitting packages of services can enable carriers to offer consumers reduced prices that reflect savings in transaction costs in that it would not be necessary for carriers to provide for separate provision, marketing, and billing of services.

Accordingly, Network Plus urges the FCC to determine that non-dominant providers of either interexchange or local exchange service may offer CPE and enhanced services on a bundled basis with telecommunications service.

VI. CONCLUSION

For these reasons, Network Plus requests that the FCC continue to impose bundling restrictions on ILEC and to order ILECs to offer voice messaging service to all consumers who request such service. Network Plus further requests that the FCC permit non-dominant providers of interexchange and local exchange service to bundle CPE and enhanced services with telecommunications service and that it continue to prohibit bundling by ILECs.

Respectfully submitted,

Russell M. Blau
Kathleen L. Greenan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Dated: November 23, 1998

Counsel for Network Plus, Inc.

EXHIBIT A

Bell Atlantic Network Services
222 Bloomingdale Road
Room 247
White Plains, NY 10605
914 644-4887 Fax 914 422-0919

Georgene Horton
Director - Account Management Resale Services
Telecom Industry Services



October 5, 1998

Michael Oyster
President, Local Services Division
Network Plus
234 Copeland Street
Quincy, MA 02169

Dear Mr. Oyster:

I am in receipt of your letter dated September 30, received by my office via fax, regarding Network Plus' perceived ordering issues with regard to voice mail and the proposed voice mail arrangement with Bell Atlantic (BA).

In your letter, you refer to an "ordering problem" in reselling BA local exchange service to customers who also use BA voice mail service. You note that when Network Plus submits an order to convert an existing BA retail customer's basic service to retail, and the customer uses BA voice mail, BA will not process the resale order without disconnecting the BA voice mail service. The phenomenon you describe is not a problem with BA's ordering process, but rather reflects BA's business decision not to offer voice mail service to end users who do not use BA as their local exchange service provider.

Moreover, notwithstanding your assertion to the contrary, BA believes it is not required under the Telecommunications Act of 1996 or otherwise to provide voice mail service to end users who do not receive local exchange service from BA. Voice mail is a relatively low-priced enhanced service, and there is neither a legal requirement nor a good business case for BA to take on the administrative, operational, and cost burdens associated with offering voice mail service to end users who do not receive BA local exchange service. Accordingly, BA is unwilling to accede to your demand that it begin selling voice mail service to end users who purchase local exchange service from Network Plus.

Please feel free to contact Steve Hartmann, of BA's Legal Department, if you would like to discuss this issue further. Mr. Hartmann can be reached on 703-974-3940.

Sincerely,

A handwritten signature in cursive script that reads "Georgene Horton".

Georgene Horton
Director

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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REPLY COMMENTS OF NETWORK PLUS, INC.

Network Plus, Inc. ("Network Plus"), by its counsel, hereby submits its reply comments in the above captioned proceedings.¹ Network Plus reemphasizes its position that incumbent local exchange carrier ("ILEC") discrimination against competitive local exchange carrier ("CLEC") customers in the provision of voice mail service ("VMS") violates the Federal Communications Commission's ("Commission") bundling regulations and federal antitrust laws. Such anticompetitive behavior threatens the emergence of competition in the local exchange market and bars consumer choice. Network Plus urges the Commission to prohibit such anticompetitive bundling and illegal tying arrangements.

¹ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Further Notice of Proposed Rulemaking, CC Docket Nos. 96-61, 98-258, released October 9, 1998 ("NPRM").

I. INTRODUCTION

Many ILECs manipulate their market power over VMS service, which has Station Message Detail Indicator ("SMDI")² capability, by refusing to offer such service unless the customer agrees to purchase the ILEC's basic telecommunications service.³ By offering VMS-SMDI on a bundled basis *only* ("VMS-bundling"), the ILECs suppress the efforts of CLECs to compete in the local exchange market, since many residential customers and most business customers are unwilling to forego their VMS-SMDI service. Network Plus urges the Commission to reject this anticompetitive VMS-bundling practice which invariably will result in the denial of consumer choice and threaten the health of the competitive marketplace for local exchange services. The Commission has the authority to and should protect the public interest from such anticompetitive market abuses, which contravene federal antitrust laws.

II. DISCUSSION

A. **The Bundling Regulations Forbid Carriers From Offering Distinct Goods and Services On A Bundled Basis *Only*, Thus Requiring Carriers To Offer Such Goods and Services Separately To Consumers**

Several ILECs comment that the bundling regulations permit the bundling of enhanced services with telecommunications services so long as the underlying telecommunications services are offered separately to other enhanced service providers.⁴ This, however, is only one facet of the

² SMDI provides a message signal (*i.e.*, stutter dial tone or message light) that is essential to many customers.

³ See *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Comments of Network Plus, Inc.*, CC Docket Nos. 96-61, 98-258 (filed November 23, 1998) at 5-13 ("Comments of Network Plus").

⁴ See, *e.g.*, *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Comments of Ameritech*, CC Docket Nos. 96-61, 98-258 (filed November 23, 1998) at 18. See also *Policy and*

Commission's policy toward bundling of enhanced and telecommunications services. The Commission has made clear that its rules prevent carriers from offering distinct goods and services *only* on a bundled basis.⁵ Therefore, the Commission prohibits a carrier from refusing to offer a consumer a distinct good and/or service apart from the carrier's competitive service. This policy safeguards against anticompetitive behavior by preventing a carrier who maintains a monopoly in one product from using that monopoly to gain or maintain control in other markets. Furthermore, this policy guards against illegal tying arrangements and guarantees consumer choice.

The ILECs' assertion that they are permitted to bundle enhanced services with telecommunications services so long as they meet one condition should not be interpreted to mean that ILECs can *discriminatorily refuse* to offer a consumer a distinct product, on a separate basis, unless that consumer purchases one of their competitive products. Such a policy would defeat the purpose of the Commission's bundling restrictions, which were designed to prevent a carrier from using its monopoly power over one service to maintain or gain monopoly control over another service or market. The federal antitrust laws and the Commission's rules do not allow such anticompetitive behavior by ILECs, which clearly *harms* the public interest by denying consumer choice and hindering the development of competition. In its examination of the current need for bundling regulations, the Commission should adopt a standard that will protect the public interest and foster competition in the future.

B. The VMS-Bundling Practice Fails To Meet The Cellular Bundling Standard Advocated By the ILECs

Rules Concerning the Interstate, Interexchange Marketplace, Comments of BellSouth, CC Docket Nos. 96-61, 98-258 (filed November 23, 1998) at 13.

⁵ *NPRM* at para. 1.

In their comments, several ILECs urge the Commission to draw comparisons between the present controversy and the *Cellular Bundling Order*.⁶ The ILECs argue that the same standard applied in the *Cellular Bundling Order* to permit the bundling of CPE and cellular service should be applied in the present proceeding. In fact, though, the ILECs' VMS-bundling practice fails to satisfy even this low threshold. The central inquiry of the *Cellular Bundling Order* was whether it would be possible, given existing market conditions, for any carrier engaged in bundling to suppress competition. The ILECs' VMS-bundling practice is clearly implicated under this standard. The comments filed by Network Plus illustrate not only that it is possible for ILECs to suppress competition by bundling local service with their VMS-SMDI, but that ILECs today are consciously engaging in otherwise irrational bundling practices *designed to suppress competition*. Thus, the failure to meet even the lowest proposed standard signifies the critical urgency with which the Commission must address the anticompetitive VMS-SMDI bundling practices of the ILECs and further demonstrates the need to maintain current bundling restrictions.

Moreover, comparing the local exchange market with the cellular market is inappropriate in view of the contrast between the historic domination of the ILEC monopolies in the local service market and the relatively open playing field in the newer cellular market. For as long as ILECs wield market power over SMDI-VMS, they should be prohibited from discriminating against CLEC subscribers in their offering of VMS regardless of the subtle market equations employed in the

⁶ *In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Docket No. 91-34, Report and order, 7 F.C.C.R. 4028 (1992) ("*Cellular Bundling Order*"). See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Comments of SBC Communications, Inc.*, CC Docket Nos. 96-61, 98-258 (filed November 23, 1998) at 3-4. See also *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Comments of Bell Atlantic*, CC Docket Nos. 96-61, 98-258 (filed November 23, 1998) at 3-4 ("*Comments of Bell Atlantic*").

C. No Competitive Alternative To VMS-SMDI Exists, Therefore, ILECs Monopoly Control Over Such Service Must Be Regulated To Prevent Abuse and To Protect the Public Interest

In their comments, the ILECs argue that enhanced services bundling regulation is no longer necessary because the enhanced service market is competitive.⁷ While many services have enjoyed the emergence of competition, VMS-SMDI remains the nearly exclusive domain of the ILECs, which necessitates regulations to prevent abuse and protect the public interest.

The ILECs argue that they do not have market power in the enhanced service market. Bell Atlantic, more specifically, argues that competition in the voice messaging market has “thrived,” noting the proliferation of answering machines.⁸ The ILECs’ position is incorrect. Answering machines are not equivalent alternatives. In fact, for many customers, especially business customers, answering machines are not even a comparable alternative to VMS-SMDI, which offers several real and perceived advantages over answering machines and other less advanced voice messaging services. For example, VMS-SMDI offers advances that include, but are not limited to, visual or audio signals announcing new messages, advanced options for sending, organizing and responding to messages, restricted passcode access available to simultaneous users, multiple-line coverage capable of simultaneous recording of multiple messages, and continued operation during power outages. In addition to these advances, strong customer preference for a convenient method of notification, such as SMDI, renders non-SMDI alternatives distinctly inferior. Consumer preferences are sufficiently inelastic to enable a carrier offering VMS-SMDI to exert anticompetitive

⁷ See, e.g., Comments of Bell Atlantic at 9-10.

⁸ See *id.*

power throughout the telecommunications market.

Evidence of Network Plus' assertions lies in the CLECs' experience with ILEC VMS customers who are interested in switching carriers. Network Plus has found that it is in fact losing customers upon their discovery that they cannot obtain service equivalent to VMS service from Network Plus. Even RCN, which offered customers a \$30 rebate toward the purchase of an answering machine, reported in an affidavit filed with the Commission that three-quarters of residential customers and nearly all business customers lost interest in RCN when they learned that they would lose their VMS. (See RCN affidavit, attached hereto as Exhibit A.)⁹

If VMS-SMDI were not a distinct product and a competitive alternative was in fact available, Network Plus would not experience cancellations from customers who otherwise preferred Network Plus' customer service, competitive rates and telecommunications service but who could not part with their VMS. If VMS-SMDI were not a distinct product, a larger percentage of consumers would accept RCN's \$30 rebate offer toward the purchase of an answering machine. If VMS-SMDI were not a distinct product, ILECs would not conclude as a "business decision" that they should refuse to provide VMS to CLEC subscribers even when the CLEC offers to assume the administrative and billing responsibilities.¹⁰ What competitive business refuses to offer its products and services to customers without an ulterior motive?

Because VMS-SMDI is a distinct product, and the ILECs possess market power over VMS-

⁹ Affidavit of Ray Wood, Director of Telephony Products for RCN Telecom Services, Inc., filed in *Complaint of RCN Telecom Services of Connecticut, et al., v. Bell Atlantic-Delaware, Inc., et al.*, CC Docket No. E-98-22 (February 28, 1998). This affidavit also offers evidence to support Network Plus' assertions, made in its initial comments, that as a CLEC it cannot yet afford to offer SMDI-VMS.

¹⁰ See Comments of Network Plus at Exhibit A (letter from Bell Atlantic to Network Plus justifying its VMS-bundling policy as a "business decision").

SMDI, it is possible for them to use such power to suppress competition. Therefore, the Commission must exercise its responsibility to protect the market from these anticompetitive abuses by prohibiting the bundling of basic telecommunications services with VMS-SMDI or any distinct service that is monopolized by the ILECs.

D. In Light of the Antitrust Violation, the Commission Should at a Minimum Prohibit such Illegal Tying Arrangements and Require ILECs to Offer VMS-SMDI Service as a Separate Service to All Consumers

Even if the Commission finds that removal of its bundling restrictions would serve the public interest, the Commission cannot ignore the ongoing anticompetitive, illegal tying arrangements that infect the VMS-SMDI and local exchange markets. Network Plus demonstrated in its Comments that the ILEC practice of forcing consumers to purchase basic telecommunications service with requested VMS service violates federal antitrust laws.¹¹ These violations deprive customers of meaningful choice for competitive telecommunications services and grind local competition to a halt. To prevent the ILECs from undermining the Commission's efforts to foster local competition, Network Plus urges the Commission to prohibit such illegal tying arrangements and to require ILECs to offer VMS-SMDI as a separate service to *all* consumers, even to consumers who choose a competitor's local service.¹²

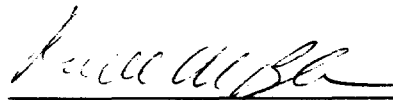
¹¹ Comments of Network Plus at 12-13.

¹² As discussed in its Comments, Network Plus notes that the California Commission has adopted such a policy requiring ILECs to offer VMS separately to all consumers. See Comments of Network Plus at 8 n. 18.

III. CONCLUSION

As set forth in its initial comments and above, Network Plus respectfully urges the Commission to prohibit ILECs from discriminating against CLEC customers in their provision of VMS-SMDI.

Respectfully submitted,



Russell M. Blau
Kathleen L. Greenan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Counsel for NETWORK PLUS, INC.

Dated: December 23, 1998

264172.1

EXHIBIT A

COPY

Before the
THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

RCN Telecom Services of Connecticut, Inc.,
RCN Telecom Services of Delaware, Inc.,
RCN Telecom Services of Maryland, Inc.,
RCN Telecom Services of Massachusetts, Inc.,
RCN Telecom Services of New Jersey, Inc.,
RCN Telecom Services of Pennsylvania, Inc.,
RCN Telecom Services of Philadelphia, Inc.,
RCN Telecom Services of Rhode Island, Inc.,
RCN Telecom Services of Virginia, Inc.,
RCN Telecom Services of Washington, D.C., Inc.,

Complainants,

v.

Bell Atlantic-Delaware, Inc.,
Bell Atlantic-Maryland, Inc.,
Bell Atlantic-New Jersey, Inc.,
Bell Atlantic-Pennsylvania, Inc.,
Bell Atlantic-Virginia, Inc.,
Bell Atlantic-Washington, D.C., Inc.,
New England Telephone and Telegraph Company,
New York Telephone Company,

Defendants.

File No. _____

AFFIDAVIT OF RAY WOOD

I, Ray Wood, being first duly sworn, depose and state as follows:

1. I am Director of Telephony Products for RCN Telecom Services, Inc. and its affiliates, RCN Telecom Services of Massachusetts, Inc., RCN Telecom Services of Rhode Island, Inc., RCN Telecom Services of Connecticut, Inc., RCN Telecom Services of New

Jersey, Inc., RCN Telecom Services of Pennsylvania, Inc., RCN Telecom Services of Philadelphia, Inc., RCN Telecom Services of Delaware, Inc., RCN Telecom Services of Maryland, Inc., RCN Telecom Services of Washington, D.C., Inc., and RCN Telecom Services of Virginia, Inc. (collectively "RCN"). My office is located at 105 Carnegie Center, Princeton, New Jersey, 08540. As the Director of Telephony Products my responsibilities include developing all telephony products for both the residential and commercial markets for RCN.

2. I hereby testify that I am familiar with the technologies used by Bell Atlantic operating companies (collectively "Bell Atlantic") in providing Voice Messaging Services ("VMS") and with the other technologies available to resellers, like RCN, in order to provide VMS.

3. RCN, and other resellers, currently cannot purchase one of the components of the VMS system from Bell Atlantic. This component, which is critical to providing service, is the VMS platform consisting of a computer and specialized voice application software enabling information to be recorded, stored and retrieved. The cost of acquiring or leasing a platform is cost prohibitive to RCN and other resellers. RCN has quotations that indicate that a platform costs approximately \$125,000 for 2000-3000 mailboxes of capacity. RCN sells voice mail boxes to consumers for \$5 to \$7 per month. RCN does not have the volume of customers available to support a facilities-based platform. Moreover, requiring resellers to invest in the facilities to provide VMS defeats the purpose of spurring competition by allowing resale of services.

4. A second critical component of VMS is SMDI ("Station Message Detail Indicator") data lines that provide a link between the Bell Atlantic switch and the VMS platform. These data links provide information to the VMS platform about calls entering the VMS system. The information provided via the SMDI links includes, but is not limited to, the called number and the time and day of the call. The links also work in conjunction with the VMS platform to set a message waiting indication on the VMS customer's line. This last component is critical to the consumer. When the customer receives a message, the SMDI links operate to provide either a stutter dial-tone or a message lamp indicator. Without the SMDI lines, the customer has no way of knowing that a message is waiting.

5. Bell Atlantic provides SMDI links at tariffed rates. The tariffed rates, however, are so high as to be cost prohibitive. For example, in Massachusetts, Bell Atlantic's tariffed rates are \$345 per month recurring fee and a one-time fee of \$1,500 for each central office. With approximately 25 to 30 central offices in a metropolitan area, RCN would be required to pay \$8,625 per month for SMDI and one-time fees of \$37,500 prior to even offering voice mail in that area. At a cost of \$8,625 per month, the purchase of SMDI lines becomes cost prohibitive. RCN would have to have approximately 1,400 voice mail customers in a region simply to break even on the recurring bill expenses if RCN billed an average of \$6 per subscriber. Moreover, RCN would be forced to incur these expenses prior to being able to offer the service for resale.

6. In addition to the SMDI cost issues, to provide comparable service with the SMDI lines, RCN needs to order Call Forwarding from Bell Atlantic. Call Forwarding is needed so when the customer's phone line is busy, or there is no answer, the call is routed

to the voice mail box of the provider. This feature would cost RCN approximately \$1.95 per month, per subscriber. This obviously puts another constraint on RCN.

7. In addition, Bell Atlantic has local access numbers for all of their voice mail customers. With these local access numbers, the customers pay the rate for local calls. This typically is a per message rate or is free as local calling is usually built into the residential line rate. As a reseller, RCN does not have local access numbers across vast geographic areas as Bell Atlantic does. To offer similar service, RCN would have to provide an 800 number to customers. This adds costs as well. For example, if a customer were to call into a voice mail box for fifteen minutes per month, this would increase RCN's per subscriber cost by approximately \$1.25 per month.

8. Although a VMS system can be created without SMDI links, a VMS system that does not offer a message indicator is an inferior product from a customer's point of view. Customers consider the message indicator to be a vital component of the VMS service.

9. Accordingly, the two alternatives to obtaining VMS are cost prohibitive for resellers. RCN does not have the customer base to cover the cost of either a platform or the purchase of SMDI links to all Bell Atlantic's central offices. Indeed, the cost of reaching resale customers with an alternative VMS is so great that it constitutes an effective barrier to competitive entry into local markets. Although RCN could provide VMS without SMDI lines, the lack of a message indicator renders RCN's VMS inferior.

10. RCN's inability to provide VMS is a competitive disadvantage. Approximately 8% of the residential customers and in excess of 10% of the business customers that

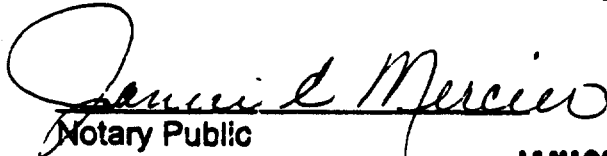
contact RCN about changing service have VMS as an existing service. For those customers, RCN offers a \$30 credit toward the purchase of an answering machine. Approximately 25% of the residential customers accept the \$30 credit and switch to RCN. 75% of the residential customers do not make the switch because they cannot obtain comparable VMS services from RCN. Few, if any, of the business customers accept the \$30 credit. For small business customers, VMS -- including a message indicator -- is viewed as a necessity.

11. Ironically, Bell Atlantic has a financial incentive to provide VMS for resellers. RCN has offered to purchase VMS at retail rates. Moreover, Bell Atlantic currently provides VMS for resale in New York pursuant to its tariff. The only reason for Bell Atlantic's refusal to deal with RCN is the prospect that it can slow down RCN's competitive entry into the Massachusetts local exchange market by making RCN's resold service less attractive to customers than Bell Atlantic's retail local service.

I hereby testify that the above information is true and accurate to the best of my knowledge, information and belief.


Ray Wood
Director of Telephony Products

Subscribed and sworn before me this 12 day of February 1998



Notary Public

My commission expires:

JANICE E. MERCIER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Oct. 11, 2000